SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 158.

THE UNITED STATES, PETITIONER,

vs.

DANIEL J. RIMER, WILLIAM D. BARRIER, AND LAWSON C. RITCHIE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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a *Transcript of record.*

United States Circuit Court of Appeals, fourth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
versus
DANIEL J. RIMER, WILLIAM D. BARRIER, AND LAWSON C. Ritchie, defendants in error. } No. 741.

In error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte, N. C.

Record filed May 1, 1907.

1 *Transcript of record.*

UNITED STATES OF AMERICA,
Western District of North Carolina, to wit:

At a circuit court of the United States for the Western District of North Carolina, begun and held in the city of Charlotte, on the second Monday in December, being the 10th day of the same month, in the year of our Lord one thousand nine hundred and six.

Present: The Honorable James E. Boyd, judge of the Western District of North Carolina.

Among other, were the following proceedings, to wit:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
DANIEL J. RYMER, WILLIAMS D. BARRIER, LAWSON C. Ritchie, defendants. } No. 428. At law.

Summons.

United States of America, Western District of North Carolina, Circuit Court, Fourth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
DANIEL J. RYMER, WILLIAMS D. BARRIER, AND LAWSON C. Ritchie, defendants. Cabarrus County. } No. 428.

The President of the United States of America to the marshal of the Western District of North Carolina, greeting:

You are hereby commanded to summon Daniel J. Rimer, William D. Barrier, and Lawson C. Ritchie, citizens and residents of the Western District of North Carolina, to appear before the
2 judges of the Circuit Court of the United States, at the next term of said court, to be held for the district aforesaid, at Charlotte, on the second Monday in December next, then and there to answer to the complaint of the United States of America, the plaintiff herein, which complaint will be filed in said court with

the first three days of said term: And let the said defendants take notice, that if they fail to answer the said complaint within the time limited by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Herein fail not, and have you then and there this summons.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Charlotte, in said District, the 29th day of June, 1904, and in the 128th year of the Independence of the United States.

H. C. COWLES,
Clerk U. S. Circuit Court, Western District of North Carolina.

Marshal's return.

Executed Aug. 8th, 1904, by delivering copy of the within summons to Daniel J. Rimer, W. D. Barrier and L. C. Ritchie.

J. M. MILLIKAN, *U. S. M.*
Per JAS. S. FREE, *D. M.*

(Endorsement:) Filed in this office, Dec. 7, 1904. H. C. Cowles, clerk.

Complaint.

In the Circuit Court of the United States for the Western District of North Carolina, December term, 1904, at Charlotte.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
DANIEL J. RYMER, WM. D. BARRIER, LAWSON C. Ritchie, defendants.

The plaintiff complains and alleges:

1st. That at the time hereinafter mentioned, the defendant, Daniel J. Rimer, intending to engage in the business of distilling
3 spirituous liquors from fruit in the 5th collection district of North Carolina, in accordance with section 3260 of the R. S. of the United States, executed and delivered to the United States as principal, together with the defendants, Wm. D. Barrier and Lawson C. Ritchie, as sureties, their bond, and thereby covenanted under their hands and seals and made their writing obligatory to the plaintiff on the 17th day of July, 1900, in the penal sum of $500.00.

2d. That the said bond was given and executed to secure the payment of the tax due the plaintiff under the internal revenue laws of the United States, upon the distilled spirits thereafter to be produced and manufactured in registered distillery, No. 44, in said district.

3d. That the conditions of said bond were that if the said distiller should fail to pay the taxes aforesaid, or fail to comply with all the provisions of law relating to the duties and business of such distiller, or fail to pay all penalties incurred, or fines imposed on him for viola-

tions of any of the said provisions, then the penalty of said bond to be forfeited.

4th. That the said distiller operated the said distillery under said bond, from the 17th day of July, 1900, to the 1st day of May, 1901, and did therein produce during said time 99/2 gallons of spirits, which he removed from said distillery premises, without paying the tax thereon, on which was assessed an internal revenue tax of $109.12 by the Commissioner of Internal Revenue, and that the tax upon said spirits has never been paid, and the said sum so assessed thereon is still due the plaintiff, together with five per cent penalty, and interest at twelve per cent per annum from the 1st day of Nov., A. D. 1900.

Wherefore, plaintiff demands judgment against the defendants for the sum of $500.00, the amount of the penalty of the bond to be discharged upon the payment of the said taxes, with penalty, interest, and costs of this action.

A. E. HOLTON,
Attorney for the United States.

Filed in this office Jun. 29, 1904.

H. C. COWLES, *Clerk.*

4 *Answer.*

In the Circuit Court of the United States for the Western District of North Carolina, as of Dec. term, 1904, at Charlotte.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
DANIEL J. RIMER, WM. D. BARRIER, AND LAWSON C. RITCHIE, defendants. | No. 428.

The defendants answering the complaint herein allege:

1. That article one thereof is true.
2. That article two thereof is true.
3. That article three thereof is true.
4. That article four thereof is not true, but the defendants aver that the taxes were duly and fully paid upon all spirits produced in said distillery.

Wherefore the defendants pray that they go without day and recover their costs.

T. C. GUTHRIE,
Atty. for Defts.

Daniel J. Rimer, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to those matters alleged on information and belief, and as to those he believes it to be true.

DANIEL J. RIMER.

Sworn to and subscribed before me this June 13th, 1905.

H. C. COWLES, *Clerk.*

Filed in this office June 13, 1905.

H. C. COWLES, *Clerk.*

5 *Fruit distiller's bond.*

Know all men by these presents, that we, Daniel J. Rimer, of Rimer, Cabarrus County, North Carolina, as principal, and William D. Barrier, of Rimer, Cabarrus County, North Carolina, and Lawson C. Ritchie, of Rimer, Cabarrus County, North Carolina, as sureties are held and firmly bound unto the United States of America in the full and just sum five hundred dollars, money of the United States; to which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 17th day of July, A. D., 1900.

The condition of the foregoing obligation is such, that whereas the said Daniel J. Rimer now, or intends on and after the 17th day of July, 1900, to be engaged in the business of distilling brandy from apples, peaches, grapes, pears, pineapples, oranges, apricots, berries, or prunes, exclusively, within the Fifth Collection District of the State of North Carolina, to wit, at Registered Distillery No. 44, situate No. street, in the township of number six, County of Cabarrus, and State aforesaid.

Now, therefore, if the said Daniel J. Rimer, shall in all respects faithfully comply with all the provisions of law and regulations in relation to the duties and business of distillers of brandy from apples, peaches, grapes, pears, pineapples, oranges, apricots, berries, or prunes, exclusively, and shall pay all penalties incurred or fines imposed on for a violation of any of the said provisions, then this obligation shall be void; otherwise it shall remain in full force.

DANIEL J. RIMER. [SEAL.]
WILLIAM D. BARRIER. [SEAL.]
LAWSON C. RITCHIE. [SEAL.]

Signed, sealed, and delivered in presence of—

JAME. E. TROUTMAN.
J. D. ALBRIGHT.

Registered Distillery No. 44 of Daniel J. Rimer, Rimer, 5th Dist. North Carolina. I hereby certify that this bond is properly
6 filled up and executed, and that the sureties thereon are, in my belief, sufficient, and I approve the same this 23rd day of July, 1900.

H. S. HARKINS,
Collector, 5th district of North Carolina.

Filed in this office Dec. 13, 1906.

H. C. COWLES, *Clerk.*

And, at said December term, 1906, of the United States Circuit Court for said district, at Charlotte, N. C., on the second Monday in December, the same being the 10th day of the same month, in the year of our Lord one thousand nine hundred and six, the Honorable James E. Boyd, judge of the Western District of North Carolina, present and presiding.

When and where the said cause being reached and coming on to be heard on December 13th, 1906, during said term of court, the following further proceedings are had in said cause, to wit:

Case called for trial, jury, issues, and verdict.

UNITED STATES *vs.* DANIEL J. RIMER, W. D. BARRIER, Lawson C. Ritchie. Cabarrus County.	No. 428. Suit on distiller's bond.

The case is called for trial.

The issues are submitted, joined, and filed.

It is ordered that a jury of good and lawful men come to try the issues joined between the parties in this case and to assess the damages of the plaintiff, if any, for the nonperformance of the premises specified in the complaint.

The following jurors, to wit:

T. C. King, J. R. Hayes, Sylvanus Daniels, E. M. Crowell, Samuel Biggerstaff, D. V. Allen, R. H. Howie, J. A. Newell, John R. Smith, L. J. Walker, P. M. Faggart, and R. T. Sistore, are chosen, tried, sworn, and impannelled to speak the truth of and concerning the issues joined between the parties, and to assess the damages of the plaintiff, if any, upon their oath for their verdict say that they find the issues in favor of the defendant as follows, to wit:

7 *Verdict.*

1. Did the defendants execute the bond sued on?

Answer. Yes.

2. Did the defendants commit a breach of said bond?

Answer. No.

3. What amount of damages, if any, has the plaintiff sustained on the bond sued on?

Answer.

Exceptions by United States attorney.

The United States attorney, in open court, and while the jury are still at bar, excepts. Exceptions allowed.

Thereupon the following judgment is rendered by the court and ordered to be entered of record, as follows, to wit:

Judgment.

In the Circuit Court of the United States for the Western District of North Carolina, December term, 1906, at Charlotte, N. C.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* DANIEL J. RIMER, WILLIAM D. BARRIER, LAWSON C. Ritchie, defendants. Cabarrus County.	No. 428. Judgment.

This case coming on to be heard at this term, and it appearing to the satisfaction of the court that the summons has been duly issued

and served on Daniel J. Rimer, William D. Barrier, and Lawson C. Ritchie, and that the complaint was filed on the 29th day of June, 1904, for the recovery of an internal revenue tax assessed against the defendant Daniel J. Rimer, for which, as alledged in the complaint, he and his sureties were liable on the bond declared on; and it appearing to the satisfaction of the court that the jury having found, upon the issues submitted, in favor of the defendants and that there is nothing due the plaintiff thereon.

8 It is now adjudged that the plaintiff take nothing by its said writ, and that the said defendants go thereof without day.

Let this judgment be entered of record.

JAS. E. BOYD, *U. S. Judge.*

(Endorsement:) Filed in this office Dec. 13, 1906. H. C. Cowles, clerk.

Order allowing the United States attorney 20 days to prepare and file exceptions.

In the United States Circuit and District Courts for the Western District of North Carolina, December term, 1906.

UNITED STATES
vs.
J. D. RYMER ET AL. } No. 428.

In this case it is ordered that the United States attorney be allowed twenty days in which to prepare and file exceptions to the rulings of the court and the defendants have twenty days thereafter to file exceptions thereto.

December 17th, 1906.

JAS. E. BOYD, *U. S. Judge.*

(Endorsement:) Filed in this office Dec. 17, 1906. H. C. Cowles, clerk.

9 *Bill of exceptions.*

In the Circuit Court of the United States for the Western District of North Carolina, at Charlotte, December term, 1906.

UNITED STATES
vs.
D. J. RYMER ET AL. } No. 428.

Be it remembered that at December term, 1906, of the U. S. Circuit Court at Charlotte, this cause coming on for trial before his honor, Jas. E. Boyd, judge, and a jury upon the issues arising in the pleadings, to wit:

Did the defendants execute the bond sued on?

Was there a breach thereof?

What amount, if any, is due the plaintiff thereon?

The defendants admitted the execution of the bond sued on.

Upon the trial of the case the plaintiff offered in evidence the assessment list from the collector's office showing an assessment against the defendant Rymer on November first, 1900, for spirits produced during August and September, 1900, amounting to $109.12.

The defendant offered himself as a witness and testified as follows: That he operated the said distillery at which the spirits described in the assessment list were alleged to have been produced, during the months of July, August, and September, 1900; that he paid taxes on all the spirits produced at said distillery during said period. On cross-examination he stated that he ground up and entered upon his record sixteen stands of fruit containing about 160 gallons each; that he distilled twelve or fourteen of these stands, and the taxes upon the spirits amounted to about $60.00, which he paid; that seven of the stands were distilled early in the season and made a fair production of spirits; that the remainder of the fruit in the stands was exposed for several weeks to the drouth, he being unable for the lack of water to distill the material out until some time in September; that when he attempted to distill this material he found that quite a quantity—about one-fourth—had rotted, and the stands had dried and leaked until he made practically no spirits therefrom.

10 The United States attorney contended that the defendants were liable for taxes upon the material used in said distillery to the amount of 80% of the taxes upon one gallon of spirits for every 14 gallons of pomace used in the distillery.

The court instructed the jury that the assessment list was prima facie evidence of the amount of taxes due, and nothing else appearing it would be the duty of the jury to so return their verdict; but that the defendant had the right to show, if he could, that being a fruit distillery that the spirits were not actually produced, and thus rebut the prima facie case of the Government; that unless the defendant actually produced the spirits he would not be liable for the taxes simply upon the quantity of material used in the distillery. The assessment imports verity. It makes a prima facie right of the Government to recover, and the Government in this case is entitled to recover, unless the defendant does satisfy the jury by a preponderance of the testimony that the spirits on which the assessment is based were not produced.

To that portion of the charge as given by the court to the effect that the defendant is not liable to be assessed for taxes upon fruit used in the distillery unless the spirits were actually produced the United States attorney excepted in open court in the presence of the jury and before the jury had retired to make up their verdict. Exception allowed by the court, signed and sealed. The jury rendered a verdict in favor of the defendants.

JAS. E. BOYD, *U. S. Judge.* [SEAL.]

(Endorsement:) Filed in this office Jany. 2d, 1907. H. C. Cowles, clerk.

Assignment of errors.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Charlotte.

THE UNITED STATES OF AMERICA
vs.
DANIEL J. RYMER, W. D. BARRIER, LAWSON C. RITCHIE.

The plaintiff, the United States, in connection with its petition for a writ of error, makes the following assignments of errors, which it avers occurred upon the trial of the case, to wit:

11

1. The court erred in charging the jury that the defendants were not liable to be assessed for taxes upon fruit used in the distillery unless the spirits were actually produced, as excepted in the bill of exceptions in the following language:

"To that portion of the charge as given by the court to the effect that the defendant is not liable to be assessed for taxes upon fruit used in the distillery unless the spirits were actually produced, the United States attorney excepted in open court in the presence of the jury and before the jury had retired to make up their verdict. Exception allowed by the court, signed and sealed. The jury rendered a verdict in favor of the defendants."

Wherefore the plaintiff in error in the Circuit Court of Appeals, the United States, prays that the judgment of the said Circuit Court may be reversed and a new trial granted.

A. E. HOLTON,
United States Attorney.

Filed in this office April 18, 1907.

H. C. COWLES, *Clerk.*

Petition for writ of error.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Charlotte.

THE UNITED STATES OF AMERICA
vs.
DANIEL J. RYMER, W. D. BARRIER, LAWSON C. RITCHIE.
Petition for writ of error.

And now comes the plaintiff, the United States, herein and says that on or about the 13th day of December, 1906, this court entered judgment herein in favor of the defendants and against the defendant; in which judgment and the proceedings had prior thereto in this case, certain errors were permitted to the prejudice of this defendant; all of which will more fully in detail appear from the assignment of errors which is filed with this petition.

12

Wherefore this plaintiff, the United States, prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Fourth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

A. E. HOLTON,
U. S. Attorney.

Order allowing writ of error.

Let a writ of error issue as prayed for in the foregoing petition April 18, 1907.

JAS. E. BOYD, *U. S. Judge.*

Filed in this office April 18, 1907.

H. C. COWLES, *Clerk.*

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Western District of North Carolina, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the United States of America, plaintiff in error, and Daniel J. Rymer, W. D. Barrier, and Lawson C. Ritchie, defendants in error, a manifest error hath happened, to the great damage of the said the United States of America as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment
13 be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond, on the 16th day of May next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 18th day of April, in the year of our Lord one thousand nine hundred and seven.

[Seal of the court.]

H. C. COWLES,
Clerk of the Circuit Court of the United States.

Allowed by—
JAS. E. BOYD, *U. S. Judge.*

Filed in this office April 18, 1907.

H. C. COWLES, *Clerk.*

Due service of the within writ of error was made on the 18th day of April, A. D. 1907, by the lodging and filing of a true copy thereof in the office of the clerk of the United States Circuit Court for the Western District of North Carolina, at Charlotte, N. C., for the adverse parties.

Teste:

H. C. COWLES, *Clerk.*

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Daniel J. Rymer, W. D. Barrier, and Lawson C. Ritchie, greeting:

You are hereby cited and admonished to be and appear at a
14 United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the 16th day of May, 1907, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of North Carolina, at Charlotte, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James E. Boyd, judge of the District Court of the United States, sitting in the Circuit Court this 18th day of April, in the year of our Lord one thousand nine hundred and seven.

[Seal of the court.] JAS. E. BOYD, *U. S. Judge.*

On this twenty-seventh day of April, in the year of our Lord one thousand nine hundred and seven, personally appeared John A. Sims, D. M., before me, the subscriber, J. W. Cobb, United States commissioner at Charlotte, N. C., and makes oath that he delivered a true copy of the within citation to Daniel J. Rymer, W. D. Barrier, and Lawson C. Ritchie at their respective houses on Thursday, April 25 (1907), nineteen hundred and seven.

JOHN A. SIMS, *Deputy Marshal.*

Sworn to and subscribed the 27th day of April, A. D. 1907.

[Commissioner's seal.] J. W. COBB,
United States Commr.

Original citation.

West. Dist. North Carolina, office U. S. marshal.
Received Apr. 19, 1907. No. 1671. Greensboro, N. C.

15 *Original.*

Recd. Apr. 22nd, 1907. Executed April 25th, 1907, by delivering a copy to each of the defendants named herein.

J. M. MILLIKAN, *U. S. Marshal.*
By JOHN A. SIMS,
Deputy Marshal, Charlotte, N. C.

Fees	$6.00
Expenses	4.95
	10.95

Order to transmit record.

And thereupon, it is ordered, by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

Teste:

H. C. COWLES, *Clerk.*

Clerk's certificate.

I, H. C. Cowles, clerk of the Circuit Court of the United States for the Western District of North Carolina, do hereby certify that the foregoing is a true, full, and complete transcript of the record and proceedings in the case of the United States of America against Daniel J. Rimer, William D. Barrier, and Lawson C. Ritchie, as fully as the same remain on file and of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the said court, at office in the city of Charlotte, in said district, this the 30 day of April, A. D. 1907.

[Seal of court.]

H. C. COWLES,
Clerk of said Court.

16 Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
DANIEL J. RIMER, WILLIAM D. BARRIER, AND LAWSON C. RITCHIE, defendants in error. | No. 741.

In error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte.

May 1, 1907, transcript of record is filed and the cause docketed.

Same day, appearance of A. E. Holton, United States attorney, for the plaintiff in error, and T. C. Guthrie and C. W. Tillett for the defendants in error; orders filed.

May 20, 1907, twenty copies of the printed record are filed.

May 29, 1907 (May term, 1907), cause is continued.

November 8, 1907 (November term, 1907), cause came on to be heard, and is argued by counsel before Pritchard, circuit judge, and Brawley and Purnell, district judges, and submitted.

November 11, 1907 (same term), the court announced and filed its opinion, which is as follows, to wit:

Opinion. Filed November 11, 1907.

United States Circuit Court of Appeals, Fourth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
DANIEL J. RIMER, WILLIAM D. BARRIER, AND LAWSON C. RITCHIE, defendants in error. } No. 741.

In error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte.

[Argued November 8, 1907. Decided November 11, 1907.]

Before Pritchard, circuit judge, and Brawley and Purnell, district judges.

17 A. L. Coble, assistant United States attorney (A. E. Holton, United States attorney on brief), for the plaintiff in error, and T. C. Guthrie and C. W. Tillett on brief for the defendants in error.

Per curiam:

After carefully considering the assignment of error herein, the court is of opinion that the same is without merit. The judgment of the court below is therefore affirmed.

Clinkenbeard et al. *v.* United States, 21 Wall., 65;

Authel H. Freeman and The National Surety Co. *v.* United States (U. S. Circuit Court of Appeals, Fourth Circuit, November term, 1907), Fed. Rep.;

United States *v.* Nebraska Distilling Co., 80 Fed. Rep., 285;

U. S. *v.* Miller, 26 Fed. Cases, No. 15770.

November 14, 1907 (same term), the court made and entered the following judgment, to wit:

Judgment. Filed November 14, 1907.

United States Circuit Court of Appeals, Fourth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
DANIEL J. RIMER, WILLIAM D. BARRIER, AND LAWSON C. RITCHIE, defendants in error. } No. 741.

In error to the Circuit Court of the United States for the Western District of North Carolina.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed.

November 14, 1907. J. C. PRITCHARD.

Order staying mandate. Filed December 2, 1907.

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES, PLAINTIFF IN ERROR,
vs.
DANIEL J. RIMER, ET AL., DEFENDANT IN ERROR.

It is ordered that the mandate in the above-entitled cause be stayed for sixty days.

J. C. PRITCHARD.

18 *Petition for a rehearing. Presented January 28, 1908.*

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
DANIEL J. RIMER, WILLIAM D. BARRINGER, AND Lawson C. Ritchie, defendants in error.
Petition to rehear.

To the Circuit Court of Appeals for the Fourth Circuit, and the Hon. J. C. Pritchard, circuit judge for the Fourth Circuit, the Hon. William H. Brawley and Hon. T. H. Purnell, district judges, who sat in the Circuit Court of Appeals for the Fourth Circuit upon the hearing of the above-entitled cause:

The plaintiff in error, the United States, files this its petition for rehearing and as grounds therefor respectfully showeth:

I.

That in passing upon the questions presented in the record the court overlooked the provisions of section 3309, Revised Statutes, wherein the Commissioner of Internal Revenue is required at the end of each month to inquire and determine whether the distiller has accounted for all the grain, fruit, or molasses used, and all the spirits produced by him during the preceding month, and which provides:

"If he is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported is found to be less than 80 per cent of the producing capacity of the said distillery as estimated according to law, he shall make an assessment for such deficiency. * * * If the commissioner finds that the distiller has not accounted for all the spirits produced by him, he shall, from all

the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced. * * * That the actual product shall be assumed to be in no case less than 80 per cent of the producing capacity of the distillery as estimated according to law."

Under the provisions of this section the distiller is made liable not only for what he actually produces but for what he should have produced according to his estimated capacity and the amount of material used.

The assessment made against the defendant in this case was upon the material he reported used, which was 80 per cent of 1 gallon for every 14 gallons of pomace distilled.

19 In the case of U. S. *v.* Singer (82 U. S., 120), in dealing with this subject, the court said:

"These several provisions are intended to secure information as to the producing capacity of the distillery; and then we have the concluding clause of the section under consideration, that in no case shall the quantity returned by the distiller, with the quantity assessed as deficit, be less than 80 per cent of such capacity.

"The system thus adopted was designed to prevent the secret production of spirits and consequent evasion of the government tax. And it seems well suited to accomplish this purpose; it at least reduces the limits within which fraud can be practiced to 20 per cent of the capacity of the distillery. In view of the enormous frauds previously practiced upon the Government in rendering accounts, this system can not be justly charged with unnecessary harshness. Everyone is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertake to distill at all, he is not entitled to much consideration."

This fixes his liability. The defendants in this case attempt to escape this assessment under the provisions of the amendment to section 3309. See section 6, act March 1, 1879 (20 Stat. L., 327), which reads as follows:

"That whenever, under the provisions of section 3309 of the Revised Statutes, an assessment shall have been made against a distiller for a deficiency in not producing 80 per cent of the producing capacity of his distillery as established by law, or for the tax upon the spirits that should have been produced from grain, or fruit, or molasses found to have been used in excess of the capacity of his distillery for any month, as established according to law, such excessive use of grain, or fruit, or molasses having arisen from a failure on the part of the distiller to maintain the capacity required by law to enable him to use such grain, or fruit, or molasses without incurring liability to such assessment, and it shall be made to appear to the satisfaction of the Commissioner of Internal Revenue that

said deficiency, or that said failure, whereby such excessive use of grain, molasses, or fruit arose, was not occasioned by any want of diligence or by any fraudulent purpose, on the part of the distiller, but from misunderstanding as to the requirements of the law and regulations in that respect or by reason of unavoidable accidents, then, and in such case, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal made to him, to remit or refund such tax, or such part thereof as shall appear to him to be equitable and just in the premises."

The liability having been fixed by statute, this amendment, under certain conditions, authorizes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, on appeal to him, to remit such taxes as shall appear to him to be equitable and just, and leaves this power entirely with the Commissioner of Internal Revenue, to be exercised in his discretion, invoking the principles governing a chancelor.

See cases cited in original brief of plaintiff in error.

II.

But if we concede for the purpose of this case tkat the court had jurisdiction to hear and submit to the jury this question of equity to the same extent as the law invested in the Commissioner of Internal Revenue, then under the circumstances we submit that the court below was in error when it charged the jury (see Record, p. 10) as follows:

"The assessment imports verity. It makes a prima facie right of the Government to recover, and the Government in this case is entitled to recover unless the defendant does satisfy the jury by a preponderance of the testimony that the spirits on which the assessment is based were not produced."

The only evidence submitted on behalf of the defendant is found on page 9 of the record and is to the effect that he operated his distillery during the months of July, August, and September, 1900; that he paid taxes on the spirits produced at said distillery, which taxes amounted to $60. On cross-examination he admitted that he entered upon the records 16 stands, containing 160 gallons each, and that he distilled 12 or 14 stands; that 7 of these stands were distilled early in the season and made a fair production; that at least 5 of these were distilled out later; that he made practically no spirits therefrom.

The charge of the court, to which exceptions were taken, made the case to depend entirely upon the production of the spirits without regard to the statutory requirements, when, according to the defendant's admissions, as appears in the evidence, he distilled 7 stands which should have produced 80 gallons, while he paid taxes on only 54.5 gallons. Besides, he distilled at least 5 other stands in which about one-fourth of the fruit had rotted, but under the charge of

the court the jury had no right to consider the quantity he should have made, but were restricted to the actual production, while under the law the defendant was chargeable with 80 per cent of the spirits he should have produced upon at least 12 stands containing 160 gallons each, estimating that 14 gallons of pomace would produce 1 gallon of brandy.

Upon the foregoing we respectfully ask that a rehearing be granted in this case, and that the judgment be reversed.

A. E. HOLTON,
U. S. Attorney.
A. L. COBLE,
Asst. U. S. Attorney.

I certify that the foregoing petition is, in my opinion, well founded and is not made for the purpose of delay.

A. E. HOLTON,
U. S. Attorney.

21 *Order denying rehearing. Filed December 16, 1908.*

United States Circuit Court of Appeals, Fourth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
DANIEL J. RIMER, WILLIAM D. BARRIER, AND LAWSON C. RITCHIE, defendants in error. } No. 741.

In error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte.

This court having at its November term, 1907, rendered its decision affirming the judgment of the said circuit court in this cause, and the plaintiff in error, by its attorneys, having on the 28th day of January, 1908, presented to the court a petition for a rehearing of the cause, and the same having been carefully considered,

It is now here ordered by this court that the rehearing asked for, be, and the same is hereby denied.

December 16, 1908.

J. C. PRITCHARD,
Circuit Judge Presiding.

And on the same day, to wit, Dec. 16, 1908, the mandate of this court is issued and transmitted to the said Circuit Court at Charlotte, N. C., in due form.

Clerk's certificate.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled

cause as the same remains upon the records and files of the said Circuit Court of Appeals, made in obedience to the annexed writ of certiorari issued out of the Supreme Court of the United States on the 10th day of March, 1909, and presented in this court on March 11, 1910.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 14th day of March, A. D. 1910.

[SEAL.] HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

22 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the United States Circuit Court of Appeals for the Fourth Circuit, greeting:

Being informed that there is now pending before you a suit in which the United States is plaintiff in error and Daniel J. Rimer, William D. Barrier, and Lawson C. Ritchie are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Western District of North Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

23 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of March, in the year of our Lord one thousand nine hundred nine.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

24 (Indorsed:) File No. 27526. Supreme Court of the United States. No. 730, October term, 1908. The United States vs. Daniel J. Rimer et al. Writ of certiorari. Presented to the court Mch. 11, 1910. The execution of the written writ appears from the schedule hereto annexed. Henry T. Meloney, Clk. U. S. Cir. Ct. of Appeals.

25 (Indorsement on cover:) File No. 21526. Supreme Court U. S. October term, 1910. Term No. 158. The United States, petitioner, vs. Daniel J. Rimer et al. Writ of certiorari and return. Filed March 16, 1910.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PETITIONER,
v.
DANIEL J. RIMER ET AL. } No. ——.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF THEREON.

The Solicitor-General, on behalf of petitioner, respectfully prays for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Fourth Circuit, adjudging that a distiller is not liable for the payment of internal-revenue taxes upon at least 80 per centum of the surveyed capacity of his distillery as required by law, but only upon the spirits actually produced by him.

The Commissioner of Internal Revenue assessed taxes against Daniel J. Rimer upon 80 per centum of the surveyed capacity of his distillery, as required by law, and said taxes not being paid, suit was instituted for their recovery from Rimer and his bondsmen (R., 2). The defendants answered that they had paid taxes on all spirits produced (R., 4). At the trial Rimer took the stand and testified that on account of drought he had been prevented from

producing the required capacity (R., 9). The court thereupon instructed the jury in effect that the Government was not entitled to recover if the defendant had satisfied them that the spirits upon which the assessment was based had not been produced (R., 10). A verdict was returned in favor of Rimer.

The Circuit Court of Appeals affirmed the judgment, citing the following cases in support thereof:

> *Clinkenbeard* v. *United States* (21 Wall., 65);
> *Authel H. Freeman, et al.* v. *United States* (157 Fed., 195);
> *United States* v. *Nebraska Distilling Co.* (80 Fed., 285);
> *United States* v. *Miller* (26 Fed. Cas., No. 15770).

The question is important. The Fourth Circuit, in which this decision will be controlling unless reversed by this court, comprises a vast spirits-producing territory. The decision not only overturns the prevailing Treasury practice and will work serious losses to the revenues, but it is a departure from the rules laid down by this court in interpreting the statute drawn in question, and compels the Government, when suing for the recovery of taxes, to meet a defense which Congress was careful to exclude from the jurisdiction of the courts. Instances in which distillers seek to evade the payment of the capacity tax here involved are numerous, and, should the decision below be acquiesced in, the future collection of these taxes will be attended with great difficulty and the purpose of Congress in this behalf thwarted.

Section 3309, Revised Statutes, as amended by the act of March 3, 1875 (18 Stat., 419), provides, *inter alia:*

> On the receipt of the distiller's return in each month the Commissioner of Internal Revenue shall inquire and determine whether the distiller has accounted for all the grain or molasses used, and all the spirits produced by him in the preceding month. If he is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported is found to be less than eighty per centum of the producing capacity of the distillery as estimated according to law, he shall make an assessment for such deficiency at the rate of ninety cents for every proof gallon. * * * All assessments made under this section shall be a lien on all distilled spirits on the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the tract of land whereon the said distillery is located, and any building thereon, from the time such assessment is made until the same shall be paid.

The act of March 1, 1879 (20 Stat., 327, 340), as amended by the act of May 28, 1880 (21 Stat., 145, 147), provides:

> That whenever, under the provisions of section thirty-three hundred and nine of the Revised Statutes, an assessment shall have been made against a distiller for a deficiency in not producing eighty per centum of the producing capacity of his distillery as established by law, or for the tax upon the spirits

> that should have been produced from the grain, or fruit, or molasses found to have been used in excess of the capacity of his distillery for any month, as estimated according to law, * * * and it shall be made to appear to the satisfaction of the Commissioner of Internal Revenue that said deficiency * * * was not occasioned by any want of diligence or by any fraudulent purpose on the part of the distiller, but from misunderstanding as to the requirements of the law and regulations in that respect *or by reason of unavoidable accidents*, then, and in such case, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury is authorized, on appeal made to him, to remit or refund such tax, or such part thereof as shall appear to him to be equitable and just in the premises.

The statute is plain and unambiguous, and in suits on behalf of Government to recover taxes assessed thereunder admits of no defense that does not attack the legality of the assessment. This court, in a series of opinions covering a long period of years, has emphatically ruled that in suits by the Government against distillers and their bondsmen to recover taxes assessed under the provisions of this statute, the trial court is without authority to entertain any defense which does not attack the legality of the assessment upon some one of the well-known grounds, *e. g.*, that the revenue officers employed an erroneous standard of capacity in assessing the tax, or misconstrued the law under which they

purported to act, and that therefore the tax is void. It is not contended in the case at bar that the defense is of this character.

The case of *United States* v. *Singer* (15 Wall., 111) is typical. The Government sued the distiller for taxes up to 80 per centum of the surveyed capacity of his distillery. The defendant pleaded that he had paid taxes on all spirits produced, to which plea a demurrer was interposed by the Government, and overruled. This court, however, reversed the judgment below, and in speaking of the construction to be placed upon section 20 of the act of July 20, 1868 (15 Stat., 133), which subsequently became section 3309, Revised Statutes, and is similar thereto so far as the present case is concerned, said (p. 118):

> Upon the construction which should be given to the twentieth section of the act of July, 1868, there appears to have been some conflict of opinion among different circuit judges. The real or supposed hardship in particular cases of imposing a tax upon an amount of spirits equal to 80 per cent. of the producing capacity of the distillery, where a less quantity has been in fact manufactured by the distiller, has undoubtedly had much to do in inducing a construction leading to a different result. But the hardship of the operation of the particular provisions of a statute has properly no place for consideration where the language is unambiguous and the legislative intent is clear. And reading the section in question by itself there does not appear to us to be any ambiguity in its language, or any

> doubt as to its meaning. Its meaning is that in no case shall the distiller be assessed for a less amount of spirits than 80 per cent. of the producing capacity of his distillery. * * *

To the same effect are:

> *Peabody* v. *Stark*, 16 Wall., 240, 243;
> *Collector* v. *Beggs*, 17 Wall., 182, 190, 191;
> *Pahlman* v. *Collector*, 20 Wall., 189, 201;
> *United States* v. *Ferrary et al.*, 93 U. S., 625, 628, 630;
> *Stoll* v. *Pepper*, 97 U. S., 438, 442;
> *Weitzel* v. *Rabe*, 103 U. S., 340, 343;
> *Chicago Distilling Co.* v. *Stone*, 140 U. S., 647, 648.

The only decision of this court which the Circuit Court of Appeals cites in support of its affirmance of the judgment below in the case at bar is that of *Clinkenbeard* v. *United States* (21 Wall., 65, 69). An analysis of that case, however, discloses that the defense there interposed attacked the legality of the assessment upon the ground that in making such assessment the revenue officers did not make allowance for the time the distillery was not in operation, but was in charge of a Government officer as required by law. That case is really not analogous to this, but so far as it may be it appears fully to support the contention of the Government here.

The next case cited by the Circuit Court of Appeals is that of *United States* v. *Nebraska Distilling Company* (80 Fed., 285), as to which it seems sufficient to say that it is rested upon decisions of this court which did not arise under the statute now drawn in question,

and of course can not be controlling in its interpretation.

As to *United States* v. *Miller* (26 Fed. Cas., No. 15770), the defense there interposed showed the assessment to be void, because the still blew up and the revenue officers put "a lock upon the furnace and fastened up the fermenting tubs," as required by law.

Whatever doubt may have existed as to the application to fruit distillers of the provisions of section 3309, Revised Statutes, is put at rest by the act of March 1, 1879 (20 Stat., 340), as amended by the act of May 28, 1880 (21 Stat., 147), which provides:

> That whenever, under the provisions of section thirty-three hundred and nine of the Revised Statutes, an assessment shall have been made against a distiller for a deficiency in not producing eighty per centum of the producing capacity of his distillery as established by law, or for the tax upon the spirits that should have been produced from the * * * fruit * * * found to have been used in excess of the capacity of his distillery * * * , etc.

Congress, in the act of March 1, 1879, as amended by the act of May 28, 1880, previously cited, has provided a mode of relief through application to the Commissioner of Internal Revenue. That fact does not help this case, but quite the contrary, for this court, in the case of *Farrell* v. *United States* (99 U. S., 221), which is analogous so far as the principle involved is concerned, has distinctly ruled that "the

provision of such a mode of relief indicates a purpose to exclude any other," and further held in that case that it could not consider the evidence given in the court below showing that the spirits sought to be taxed had been destroyed by fire without the fault or negligence of the distiller; that these were matters which Congress had committed to the consideration of the Commissioner of Internal Revenue alone.

Should the judgment below be accepted, the Government will be greatly hampered in the collection of taxes, and in the numerous cases in which suit will undoubtedly have to be instituted its right to recover will, in many instances, be defeated by a defense which it can not overcome because it had no notice of it prior to the time of trial. It was doubtless for this very reason that Congress constituted the Commissioner of Internal Revenue the sole tribunal to consider and determine such matters upon a proper showing and after investigation.

The question is therefore of very great importance to the Treasury Department in the future administration of the law and the collection of the revenues, and I respectfully submit that the writ should issue.

HENRY M. HOYT,
Solicitor-General.

~~OCTOBER, 1908.~~

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PETITIONER,
v.
DANIEL J. RIMER, WILLIAM D. BARRIER, and Lawson C. Ritchie. } No. 158.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This is a suit by the United States against Daniel J. Rimer, a distiller of North Carolina, and William D. Barrier and Lawson C. Ritchie, the sureties upon his bond.

The complaint

alleged in articles 1, 2, and 3 the execution of the distiller's bond and its conditions, and further alleged (R., 3)—

> That the said distiller operated the said distillery under said bond from the 17th day of July, 1900, to the 1st day of May, 1901, and did therein produce during said time 99.2 gallons of spirits, which he removed from said

> distillery premises, without paying the tax thereon, on which was assessed an internal revenue tax of $109.12 by the Commissioner of Internal Revenue, and that the tax upon said spirits has never been paid, and the said sum so assessed thereon is still due the plaintiff, together with five per cent penalty, and interest at twelve per cent per annum from the 1st day of Nov., A. D. 1900.

Judgment was asked for the penalty of the bond, $500, to be discharged upon payment of the taxes, with penalty, interest, and costs. (R., 3.)

The answer

admitted articles 1, 2, and 3 of the complaint to be true, but alleged (R., 3)—

> That article four is not true, but the defendants aver that the taxes were duly and fully paid upon all spirits produced in said distillery.

So the defendants prayed to be dismissed with their costs.

The record of the trial

is meager and somewhat obscure. In full it is as follows (R., 7):

> Upon the trial of the case the plaintiff offered in evidence the assessment list from the collector's office showing an assessment against the defendant Rymer on November 1st, 1900, for spirits produced during August and September, 1900, amounting to $109.12.

The defendant offered himself as a witness and testified as follows:

That he operated the said distillery at which the spirits described in the assessment list were alleged to have been produced, during the months of July, August, and September, 1900; that he paid taxes on all the spirits produced at said distillery during said period. On cross-examination he stated that he ground up and entered upon his record sixteen stands of fruit containing about 160 gallons each; that he distilled twelve or fourteen of these stands, and the taxes upon the spirits amounted to about $60.00, which he paid; that seven of the stands were distilled early in the season and made a fair production of spirits; that the remainder of the fruits in the stands was exposed for several weeks to the drouth, he being unable for the lack of water to distill the material out until some time in September; that when he attempted to distill this material he found that quite a quantity—about one-fourth—had rotted, and the stands had dried and leaked until he made practically no spirits therefrom.

The United States Attorney contended that the defendants were liable for taxes upon the material used in said distillery to the amount of 80 per cent of the taxes upon one gallon of spirits for every 14 gallons of pomace used in the distillery.

The court instructed the jury that the assessment list was prima facie evidence of the amount of taxes due, and nothing else appearing it would be the duty of the jury to so

return their verdict; but that the defendant had the right to show, if he could, that being a fruit distillery that the spirits were not actually produced, and thus rebut the prima facie case of the Government; that unless the defendant actually produced the spirits he would not be liable for the taxes simply upon the quantity of material used in the distillery. The assessment imports verity. It makes a prima facie right of the Government to recover, and the Government in this case is entitled to recover, unless the defendant does satisfy the jury by a preponderance of the testimony that the spirits on which the assessment is based were not produced.

To that portion of the charge as given by the court to the effect that the defendant is not liable to be assessed for taxes upon fruit used in the distillery unless the spirits were actually produced the United States Attorney excepted in open court in the presence of the jury and before the jury had retired to make up their verdict. Exception allowed by the court, signed and sealed. The jury rendered a verdict in favor of the defendants.

JAS. E. BOYD, *U. S. Judge.* [SEAL.]

The case was by the United States taken to the Court of Appeals for the Fourth Circuit upon the single assignment of error that (R., 8)—

1. The court erred in charging the jury that the defendants were not liable to be assessed for taxes upon fruit used in the distillery unless the spirits were actually produced, as ex-

cepted in the bill of exceptions in the following language:

"To that portion of the charge as given by the court to the effect that the defendant is not liable to be assessed for taxes upon fruit used in the distillery unless the spirits were actually produced, the United States attorney excepted in open court in the presence of the jury and before the jury had retired to make up their verdict. Exception allowed by the court, signed and sealed. The jury rendered a verdict in favor of the defendants."

The Court of Appeals

disposed of the case summarily thus (R., 12):

Per curiam:

After carefully considering the assignment of error herein, the court is of opinion that the same is without merit. The judgment of the court below is therefore affirmed.

Clinkenbeard et al. v. *United States,* 21 Wall., 65;

Authel H. Freeman and The National Surety Co. v. *United States* (U. S. Circuit Court of Appeals, Fourth Circuit, November term, 1907), Fed. Rep.;

United States v. *Nebraska Distilling Co.,* 80 Fed. Rep., 285;

U. S. v. *Miller,* 26 Fed. Cases, No. 15770.

A petition for rehearing

was presented and overruled.

Application for a

writ of certiorari

was then made to this court and the writ granted.

The case was presented to this court by the petition for certiorari as involving the proper construction of sections 3309 and 3309*a* of the Statutes of the United States, which, in full, are as follows:

> SEC. 3309. On the receipt of the distiller's return in each month, the Commissioner of Internal Revenue shall inquire and determine whether the distiller has accounted for all the grain or molasses used, and all the spirits produced by him in the preceding month. If he is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported is found to be less than eighty per centum of the producing-capacity of the distillery as estimated according to law, he shall make an assessment for such deficiency at the rate of ninety cents for every proof gallon. In determining the quantity of grain used, fifty-six pounds shall be accounted as a bushel; and if the Commissioner finds that the distiller has used any grain or molasses in excess of the capacity of his distillery as estimated according to law, he shall make an assessment against the distiller at the rate of ninety cents for every proof-gallon of spirits that should have been produced from the grain or molasses so used in excess, which assessment shall be made whether the quantity of spirits reported is equal to or exceeds eighty per centum of the producing-capacity of the distillery. If the

Commissioner finds that the distiller has not accounted for all the spirits produced by him, he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of ninety cents for every proof-gallon: *Provided*, That the actual product shall be assumed to be in no case less than eighty per centum of the producing capacity of the distillery as estimated according to law. All assessments made under this section shall be a lien on all distilled spirits on the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the tract of land whereon the said distillery is located, and any building thereon, from the time such assessment is made until the same shall have been paid. [Sec. 3309, Rev. Stat., as amended by the act of March 3, 1875, 18 Stat. 419; Comp. Stat., 1901, vol. 2, p. 2158.]

The section referred to by us as 3309*a* is the following:

SEC. 3309*a*. That whenever, under the provisions of section thirty-three hundred and nine of the Revised Statutes, an assessment shall have been made against a distiller for a deficiency in not producing eighty per centum of the producing-capacity of his distillery as established by law, or for the tax upon the spirits that should have been produced from the grain, or fruit, or molasses

found to have been used in excess of the capacity of his distillery for any month, as estimated according to law, such excessive use of grain, or fruit, or molasses having arisen from a failure on the part of the distiller to maintain the capacity required by law to enable him to use such grain, or fruit, or molasses without incurring liability to such assessment, and it shall be made to appear to the satisfaction of the Commissioner of Internal Revenue that said deficiency, or that said failure, whereby such excessive use of grain, molasses, or fruit arose, was not occasioned by any want of diligence or by any fraudulent purpose, on the part of the distiller, but from misunderstanding as to the requirements of the law and regulations in that respect or by reason of unavoidable accident, then, and in such case, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury is authorized, on appeal made to him, to remit or refund such tax, or such part thereof as shall appear to him to be equitable and just in the premises; and the Commissioner of Internal Revenue upon the production to him of satisfactory proof of the actual destruction, by accidental fire or other casualty, and without any fraud, collusion, or negligence of the distiller of any spirits in process of manufacture or distillation, or before removal to the distillery warehouse, shall not assess the distiller for a deficiency in not producing eighty per centum of the producing capacity of his distillery as established by law when the deficiency is occasioned by such destruction, nor shall he, in such case, assess the

tax on the spirits so destroyed: *Provided*, That no tax shall be remitted or refunded under the provisions of this section upon any assessment made prior to January first, eighteen hundred and seventy-four: *Provided further*, That no assessments shall be charged against any distiller of fruit for any failure to maintain the required capacity, unless the Commissioner shall, within six months after his receipt of each monthly report notify such distiller of such failure so to maintain the required capacity. [Act of March 1, 1879, 20 Stat. 327, 340, as amended by act of May 28, 1880, 21 Stat. 145, 147; U. S. Comp. Stat., 1901, pp. 2158, 2159.]

PROPOSITION OF LAW AND AUTHORITIES.

If a distiller produces spirits in quantity less than 80 per cent of the estimated producing capacity of his distillery for any month, relief against the assessment for the deficiency authorized by law must be sought by appeal to the Commissioner of Internal Revenue for a remission of the deficiency tax, upon a showing that the deficiency "was not occasioned by any want of diligence or by any fraudulent purpose on the part of the distiller, but from misunderstanding as to the requirements of the law in that respect or by reason of unavoidable accident"; and if the distiller ignores this mode of relief he can not make his showing against the deficiency assessment for the first time in a suit upon it.

United States v. *Singer*, 15 Wall., 111.
Farrell v. *United States*, 99 U. S., 221.
Haycraft v. *United States*, 22 Wall., 81.

ARGUMENT.

The record in this case is neither full nor clear. We assume, however, from what does appear that the assessment sued upon was for a deficiency in the production of the distiller below 80 per cent of the producing capacity of his distillery for the months of August and September.

We assume this because of the contention of the United States attorney "that the defendants were liable for taxes upon the material used in said distillery to the amount of 80% of the taxes upon one gallon of spirits for every 14 gallons of pomace used in the distillery" (R., 7).

The estimated producing capacity of the material used, one gallon of spirits for 14 gallons of pomace, is that prescribed by the regulations.

No objection was made to the assessment upon any formal grounds, and the ruling of the court which was decisive of the case was simply that, Rimer's distillery being a fruit distillery, he had the right to show that the spirits for which he was charged by the assessment were not actually produced, and that if they were not actually produced he was not liable for any tax on account of them.

This ruling means that a fruit distillery is not within the scope of sections 3309 and 3309*a*.

Very clearly a fruit distillery was not within the scope of section 3309 as originally enacted, for that is in terms limited to distillation from grain and molasses.

But 3309*a* extends the scope of 3309. It makes provision for relief to the distiller against an assessment under 3309 "for a deficiency in not producing eighty per centum of the producing-capacity of his distillery as established by law, or for the tax upon the spirits that should have been produced from the grain, *or fruit*, or molasses found to have been used in excess of the capacity of his distillery for any month, as estimated according to law."

It may be contended, if we do not look beyond this portion of the statute, that the assessment for a deficiency remains as under original section 3309, and that only the assessment for material used in excess of the capacity of the distillery is extended to fruit as well as to grain and molasses, but the matter is put beyond question by the final proviso of 3309*a*, which is—

> *Provided further*, That no assessments shall be charged against any distiller of fruit for any failure to maintain the required capacity, unless the Commissioner shall, within six months after his receipt of each monthly report notify such distiller of such failure so to maintain the required capacity. (20 Stat., 327, 340.)

This proviso seems to have been entirely overlooked in the consideration of the case by court and by counsel alike in the Circuit Court and in the Circuit Court of Appeals.

It makes plain that a fruit distiller as well as the distiller from grain or molasses is subject to an

assessment for deficiency, and that the only discrimination in his behalf is that before any assessment for deficiency is charged against him the commissioner must notify him "of such failure to maintain the required capacity."

In every other respect the fruit distiller is subject to all the provisions of sections 3309 and 3309*a*, and is entitled to all their benefits.

The validity of the assessment for deficiency of production was definitely settled by *United States* v. *Singer* (15 Wall., 111). The ruling of the court below was in the very teeth of this case, for it was that if there had been no production there could be no assessment. It accorded to the assessment in the case of the fruit distiller only the force of *prima facie* evidence that spirits to the amount of the tax assessed had been produced, and made it subject to rebuttal by evidence that there was no such production.

It did not even require a showing from the distiller that the deficiency was not due to any fraud or fault on his part, but was occasioned by misunderstanding of the law or unavoidable accident.

The distiller here did assume to explain that his failure to get out of his material the estimated amount of spirits was due to rot and leakage, but no such explanation was necessary under the charge of the court.

He had confessedly ground up and entered upon his record 16 stands of fruit, containing about 160 gallons each, and in his production from this he fell below 80 per cent of the estimated spirit capacity.

He was liable for the tax upon the deficiency unless relieved therefrom by the commissioner, who, upon appeal, was authorized, upon proper showing, to remit "the tax, or such part thereof as shall appear to him to be equitable and just in the premises."

This case is in principle not to be distinguished from *Farrell* v. *United States* (99 U. S., 221), where indeed the equities in favor of the distiller were very strong. There the spirits were destroyed by fire, but this was held not to be a defense to a suit for the taxes upon them.

The act of Congress of May 27, 1872 (ch. 218, 17 Stat., 162), provided—

> That the Secretary of the Treasury be, and he is hereby, authorized, upon the production of satisfactory proof to him of the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof, of any distilled spirits on which the tax at the time of the destruction of said spirits had not been paid and while the same remained in the custody of any officer of internal revenue in any distillery warehouse or bonded warehouse of the United States, to abate the amount of internal revenue taxes accruing thereon, and to cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be; and if such taxes have been collected since the destruction of said spirits, then the Secretary of the Treasury shall refund the same to the owners thereof out of any money in the Treasury not otherwise appropriated.

In the *Farrell* case the court said (p. 224):

> * * * The case of the distiller may be a hard one; but this misfortune is not the fault of the government. He might have protected himself by insurance, and possibly he did; or he might have obtained relief under the act of Congress of May 27, 1872, 17 Stat. 162. By that act Congress has provided a way in which a remission of the tax upon distilled liquors, casually destroyed while in the custody of a revenue officer in a bonded warehouse, may be obtained. The provision of such a mode of relief indicates a purpose to exclude any other.

This was but repeating what the court had said in *Haycraft* v. *United States* (22 Wall., 81, l. c. 98). There the suit was to recover the proceeds of property taken by the United States during the war. The same act of Congress provided for a restoration of property so taken and the procedure in accordance with which the restoration must be made. The court said (p. 98):

> There is here no question of confiscation. The title of the United States, whatever may be the rights it carries with it, is by authorized capture or appropriation of enemy's property on land. But the same statute which authorized the capture gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with the right to demand was a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, and in such cases the remedy provided is exclusive of all others.

> The demandant in this case neglected to avail himself of the remedy provided, and consequently he is now without any. That remedy was the only one of which the Court of Claims or any other court has been authorized to take jurisdiction. It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided.

In the case at bar the right is conferred and the remedy prescribed by the same act. Whoever enters upon the business of distilling does it under the obligation to pay taxes upon at least 80 per cent of the capacity of his distillery during the authorized period of operation. This is a reasonable measure of supervision well adapted to protect the Government against fraud, and, in view of previous experience, could not, this court said in the *Singer* case, "be justly charged with unnecessary harshness." Section 3309*a*, however, gives a right to relief from an assessment for any deficiency, but it also provides that application for that relief must be made to the Commissioner of Internal Revenue, and in him is vested the jurisdiction to deal with the case presented "as shall appear to him to be equitable and just in the premises."

In the case of the fruit distiller it is provided that notice shall first be given, and so opportunity is afforded him to make a showing in advance against the imposition of the assessment. If the distiller chooses to ignore this notice, makes no explanation of the deficiency to the commissioner, and asks no relief from him, it should not be open to him to

challenge an assessment made in pursuance of law when suit is brought upon it.

The cases cited by the Circuit Court of Appeals as sustaining its action are not applicable.

In *Clinkenbeard* v. *United States* (21 Wall., 65) the facts were that on the first four days for which deficiency taxes were assessed against Clinkenbeard he was unable to operate because no storekeeper had been assigned by the Government to the distillery, and that for the other four days he had by reason of unavoidable accident been unable to operate, had given the notice of the accident required by law, and during those four days the machinery was securely fastened by an assistant assessor, and remained fastened, as required by law.

It is to be observed that the Government had notice and knowledge at the time that Clinkenbeard could not operate his distillery during the period for which he was assessed. The court said (p. 69):

> The distiller, without any fault of his own, but by the omission of the Government itself, was prevented from operating his distillery for the first four days for which he was taxed, and his distillery was inactive from an accident, and in charge of a Government officer, as prescribed by law, for four other days. He could not, without a breach of law, commence distilling till a storekeeper was assigned him, and he acted in compliance with the law when his distillery was stopped by accident.

So it was held—four judges, however, dissenting—that the assessment was clearly illegal and could not

be enforced by the aid of the courts. The dissenting judges—Justices Clifford, Swayne, Davis, and Strong—held that even in such a case as this the distiller should have appealed to the Secretary of the Treasury, as required by the act of Congress.

Freeman v. *United States* (157 Fed. Rep., 195) was a suit by the United States to recover taxes upon distilled spirits manufactured by Freeman and duly deposited in a bonded warehouse. It was admitted that the warehouse was accidentally destroyed by fire, without fraud, collusion, or negligence on the part of the distiller and that the spirits were lost. The case was decided upon an amendment passed March 1, 1879, to section 3221 of the Revised Statutes, which amendment provides (20 Stat., 327, 341):

> And when any distilled spirits are hereafter destroyed by accidental fire or other casualty, without any fraud, collusion, or negligence of the owner thereof, after the time when the same should have been drawn off by the gauger and placed in the distillery-warehouse provided by law, *no tax shall be collected on such spirits so destroyed*, or, if collected, it shall be refunded upon the production of satisfactory proof that the spirits were destroyed as herein specified.

Here was a plain mandate that no tax should be collected on the spirits so destroyed, and there was of course no authority to make any assessment, and in that vital respect the case differs from the one at bar, in which there was plain authority to make the

assessment in the absence of the showing against it prescribed by law.

United States v. *Nebraska Distilling Company* (80 Fed. Rep., 285) was a suit to recover deficiency taxes in which it was alleged by way of defense that the deficiency was caused by the use of a new still, which was imperfect and defective in its working. No application was made to the commissioner for relief, but the court held that the case came within the decision of *Clinkenbeard* v. *United States* (*supra*), which it construed to hold that the prohibition against bringing a suit until after an appeal to the commissioner does not apply when suit is brought by the Government and the person taxed is defendant instead of plaintiff. We do not understand this to be the effect of the decision in the *Clinkenbeard* case. The decision there was that when the tax was illegal the aid of the court would not be granted for its collection. The tax sought to be collected there was one for a deficiency resulting from the complete non-operation of the distillery under circumstances when, to the knowledge of the Government, it could not be legally operated; and so the *Nebraska Distilling Company* case, it is respectfully submitted, is not supported by the authority upon which it is based.

In *United States* v. *Miller* (5 Biss., 128) the suit was to recover deficiency taxes. The defense was that on a certain day the still blew up, of which fact the assessor was notified, whereupon he put a lock upon the furnace and fastened up the fermenting tubs, in which condition the establishment remained during the period for which the deficiency tax was assessed.

Blodgett, district judge, held simply that under these circumstances the distiller could not be charged with the tax.

In the case at bar the facts are very different and clearly of such nature that they should have been called to the attention of the Commissioner of Internal Revenue upon an application for a remission of the tax. The distillery was in operation, or in condition for operation, all of the time involved, and the only complaint is that the fruit had become impaired by reason of a delay caused by drought, so that when the distiller attempted to distill his material he did not get from it the quantity of spirits expected and ordinarily produced.

There is no conflict between *Clinkenbeard* v. *United States* (21 Wall., 65) and *Farrell* v. *United States* (99 U. S., 221). In each case the suit was by the United States to enforce an assessment. In the first it was held that the assessment was illegal and void. In the second it was held that the assessment was legal, and that relief against it could be had only in the manner prescribed by the act which granted the right to relief. The *Farrell* case is applicable here unless it be, as seems to be implied in the charge to the jury upon the trial of this case, that a fruit distiller is not subject to a deficiency assessment. The statute, however, plainly includes him; and we respectfully submit that the judgment herein should be reversed.

F. W. LEHMANN,
Solicitor General.

APRIL, 1911.

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UNITED STATES v. RIMER.

CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 158. Argued April 26, 1911.—Decided May 15, 1911.

When certiorari is granted on the basis that the decision below involved principles of far-reaching effect and overthrew settled administrative construction, and it appears on the argument that the decision does not deal with such principles or have such effect, and that the action of the court below was not, either as to its character or importance, within the scope of the grant of power given by the Judiciary Act of 1891 to review by certiorari, the writ will be dismissed.

THE facts, which involve the jurisdiction of this court in regard to the scope of the grant of power under the Judiciary Act of 1891 to review judgments of the Circuit Courts of Appeal, are stated in the opinion.

The Solicitor General for the United States.

There was no appearance or brief filed for the respondent.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The petition presented by the United States in this case for the allowance of a writ of certiorari, which was not opposed, proceeded upon the basis that the decision below involved a principle concerning the collection of internal revenue taxes of far-reaching importance, and which if thereafter applied in accordance with what it was urged was the rule established by the lower court would over-

throw practices prevailing as to the collection of internal revenue taxes for a long period of time, founded upon a well settled administrative construction, and thus produce at least great confusion.

As the record at least *prima facie* tended to sustain these contentions of the Government, the writ of certiorari was granted. With candor, in the argument at bar, while perspicuously discussing the legal propositions which it was deemed were involved when the certiorari was petitioned for, the Government conceded that a closer scrutiny of the record made it exceedingly doubtful whether the action of the court below, when accurately tested, dealt with the principle, which, it was deemed, rendered the granting of the writ necessary. Coming to consider the record, we conclude that it establishes that the doubt suggested by the Government is well founded, and, therefore, if we were to consider and decide the case we would but review the action of the court below in regard to a question as to which, under the Judiciary Act of 1891, the action of the court was final, and which, neither from its character or importance, was within the scope of the grant of power to review by certiorari.

After giving the matter most careful consideration because of the precedent as to future cases which must arise from the action we take in this, we have concluded that, under the conditions which we have stated, our duty is not to pass upon the merits of the case, but to dismiss the writ of certiorari. Our order will therefore be

Writ of certiorari dismissed.